

Products that qualify as medicines, drugs, or medical appliances are taxed at the reduced sales tax rate of 1% plus applicable local taxes. See 86 Ill. Adm. Code 130.310. (This is a GIL.)

April 30, 2007

Dear Xxxxx:

This letter is in response to your letter dated December 5, 2006, in which you request information. The Department issues two types of letter rulings. Private Letter Rulings ("PLRs") are issued by the Department in response to specific taxpayer inquiries concerning the application of a tax statute or rule to a particular fact situation. A PLR is binding on the Department, but only as to the taxpayer who is the subject of the request for ruling and only to the extent the facts recited in the PLR are correct and complete. Persons seeking PLRs must comply with the procedures for PLRs found in the Department's regulations at 2 Ill. Adm. Code 1200.110. The purpose of a General Information Letter ("GIL") is to direct taxpayers to Department regulations or other sources of information regarding the topic about which they have inquired. A GIL is not a statement of Department policy and is not binding on the Department. See 2 Ill. Adm. Code 1200.120. You may access our website at www.ILTAX.com to review regulations, letter rulings and other types of information relevant to your inquiry.

The nature of your inquiry and the information you have provided require that we respond with a GIL. In your letter you have stated and made inquiry as follows:

My client is [sic] California based medical supplies reseller and he is planning to sell and ship prescribed medical breath equipment and supplies to Illinois customers using a common carrier.

Company sells prescribed respiratory medical devices for the treatment of sleep-disordered breathing. Such as CPAP Devices, Autotitration Devices, Bilevel Devices, Nasal Pillows System, Nasal Masks, Full Face Masks, Heated Humidifiers, Passive Humidifiers and so on.

Questions:

1. Are sales of those items subject to Sales Tax in Illinois? Or they exempt?
2. Does my client need to file Sales Tax Return to the State of Illinois anyway? Or is it considered [sic] exempt company?

I read information on web site but still need clearance of those questions.

I will really appreciate your help.

DEPARTMENT'S RESPONSE

For useful information regarding the taxation of food, drugs, medicines and medical appliances, we refer you to the Department's regulation at 86 Ill. Adm. Code 130.310. Those products that qualify as medicines, drugs, or medical appliances are taxed at the reduced tax rate of 1% plus applicable local taxes. Those that do not qualify for the low rate are taxed at the State rate of 6.25%, plus applicable local taxes.

We do not have enough information to tell you whether or not the items in question qualify for the low rate of tax. Some of the items listed in your inquiry may qualify for the low rate of tax if they are part of a system used in breathing by patients who have breathing disabilities. If they are not part of a system used in breathing by patients who have breathing disabilities, these items are subject to the higher rate of tax. Please note that in order for an item to qualify as a medical appliance the item must be intended by its manufacturer for use in directly substituting for a malfunctioning part of the body.

For example, a ventilator can qualify as a medical appliance if it directly substitutes for a malfunctioning part of the body, in this case the lungs. If a ventilator is directly used to aid a patient in breathing thereby substituting for the patient's lungs, the ventilator will qualify for the low rate. If however, the ventilator were used in another way, such as to treat patients by administering medicine to them, the ventilator would not qualify because it is not being used in a qualifying manner. In other words, it is not the item itself that qualifies or does not qualify, but the manner in which it is being used.

Determinations regarding nexus are very fact specific and cannot be addressed in the context of a General Information Letter. The Department has found that the best manner to determine nexus is for a Department auditor to examine all relevant facts and information. The following guidelines, however, may be useful to you in determining whether your company would be considered "a retailer maintaining a place of business in Illinois" subject to Use Tax collection obligations.

An "Illinois Retailer" is one who either accepts purchase orders in the State of Illinois or maintains an inventory in Illinois and fills Illinois orders from that inventory. The Illinois Retailer is then liable for Retailers' Occupation Tax on gross receipts from sales and must collect the corresponding Use Tax incurred by the purchasers.

Another type of retailer is the retailer maintaining a place of business in Illinois. The definition of a "retailer maintaining a place of business in Illinois" is described in 86 Ill. Adm. Code 150.201(i). This type of retailer is required to register with the State as an Illinois Use Tax collector. See 86 Ill. Adm. Code 150.801. The retailer must collect and remit Use Tax to the State on behalf of the retailer's Illinois customers even though the retailer does not incur any Retailers' Occupation Tax liability.

The United States Supreme Court in *Quill Corp. v. North Dakota*, 112 S.Ct. 1904 (1992), set forth the current guidelines for determining what nexus requirements must be met before a person is properly subject to a state's tax laws. The Supreme Court has set out a 2-prong test for nexus. The first prong is whether the Due Process Clause is satisfied. Due process will be satisfied if the person or entity purposely avails itself or himself of the benefits of an economic market in a forum state. *Quill* at 1910. The second prong of the Supreme Court's nexus test requires that, if due process requirements have been satisfied, the person or entity must have physical presence in the forum state to satisfy the Commerce Clause. A physical presence is not limited to an office or other physical building. Under Illinois law, it also includes the presence of any agent or representative of the seller. The representative need not be a sales representative. Any type of physical presence in the State of Illinois, including the vendor's delivery and installation of his product on a repetitive basis, will trigger

Use Tax collection responsibilities. Please refer to *Brown's Furniture, Inc. v. Wagner*, 171 Ill.2d 410, (1996).

The final type of retailer is the out-of-State retailer that does not have sufficient nexus with Illinois to be required to submit to Illinois tax laws. A retailer in this situation does not incur Retailers' Occupation Tax on sales into Illinois and is not required to collect Use Tax on behalf of its Illinois customers. However, the retailer's Illinois customers will still incur Use Tax liability on the purchase of the goods and have a duty to self-assess and remit their Use Tax liability directly to the State.

If you require additional information, please visit our website at www.ILTAX.com or contact the Department's Taxpayer Information Division at (217) 782-3336. If you are not under audit and you wish to obtain a binding PLR regarding your factual situation, please submit a request conforming to the requirements of 2 Ill. Adm. Code 1200.110 (b).

Very truly yours,

Martha P. Mote
Associate Counsel

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